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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

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IN THE MATTER OF U S WEST  
COMMUNICATIONS, INC.'SCOMPLIANCE WITH SECTION 271 OF THE  
TELECOMMUNICATIONS ACT OF 1996

) DOCKET NO. T-00000A-97-0238

)

) MOTION FOR STAY OF

) PROCEEDING OR, IN THE

) ALTERNATIVE, TO REOPEN

) THE RECORD REGARDING THE

) PUBLIC INTEREST

AT&T Communications of the Mountain States, Inc. and TCG Phoenix (collectively "AT&T") submit the following Motion for Stay of Proceedings or, in the alternative, to reopen the record regarding the public interest, and as grounds states the following:

### SUMMARY AND RELIEF REQUESTED

Throughout these proceedings, AT&T has repeatedly demonstrated, in its testimony and briefs, that Qwest Corporation ("Qwest") has not only failed to meet the requirements of the Telecommunications Act of 1996 ("Act"), but has shown itself to be so cavalier with the law and its competitors, that a favorable recommendation on its section 271 Application must be denied. Qwest's July 29, 2002, announcement that it incorrectly applied its accounting policies to certain optical capacity and equipment transactions during 1999 through 2001, thereby requiring revenue adjustments of up to \$1.16 billion, is an admission that its "lit capacity IRU" agreements are service contracts, not the "asset sales" of facilities that Qwest has purported to hold them out to be. As such, Qwest has been unlawfully providing in-region, interLATA services through such agreements since the time of the merger between U S WEST and Qwest. Moreover, currently available evidence indicates that Qwest knew, or should have known, that its provision

of such "lit capacity IRUs" was and remains a clear violation of section 271. Thus, there is substantial basis for concluding that Qwest has deliberately attempted to deceive the Federal Communications Commission ("FCC") and state regulators with regard to this violation of section 271. Qwest should not be rewarded for such conduct by granting it the authority it seeks under the very statute that its actions have shown it has been violating all along.

Investigations are under way before the FCC, the United States Securities and Exchange Commission ("SEC") and United States Department of Justice ("DOJ") to determine the full extent of Qwest's misconduct. Until such time as those regulators have concluded their investigations into this matter, this Commission should officially suspend further consideration of Qwest's application for interLATA authority under section 271. As an alternative, the Commission could initiate its own investigation into Qwest's use of IRUs in the Qwest region. Depending upon whether Qwest would cooperate, such an investigation could be concluded quickly, and without unduly extending the procedural schedule for this docket.<sup>1</sup> The Commission should not be placed in the position of having to provide a recommendation on Qwest's section 271 application without knowing whether Qwest has provided, and continues to provide, in-region, interLATA services in its region in violation of the Act. If ultimately it is determined that Qwest is violating the Act, Qwest must be required to come into compliance with the Act before any recommendation is made by this Commission.

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<sup>1</sup> The Commission has indefinitely suspended review of Qwest's section 271 Application to review the effects, if any, of Qwest's unfiled agreements with competitive local exchange carriers on the section 271 process. Staff will be releasing its report shortly. Pursuant to the Procedural Order dated July 9, 2002, the parties have 10 days to comment on Staff's report and how the proceeding should proceed. The parties are also waiting on the Administrative Law Judge's recommended switching cost order in the cost case.

## DISCUSSION

As described in Touch America's complaints pending before the FCC, Qwest has been violating section 271 through its so-called "lit capacity IRU" agreements.<sup>2</sup> In response, Qwest has claimed that its "lit capacity IRU" agreements are asset sales (*i.e.*, a sale of facilities), not leases of telecommunications services. However, Qwest's invocation of the term "IRU" is nothing more than a red herring intended to obfuscate its clear statutory violation, and Qwest's announcement that it has improperly accounted for these types of transactions is an admission by Qwest that its "IRU" scheme has finally been uncovered. By its own admission, it appears Qwest has been violating section 271 of the Act.

By cloaking these transactions in the guise of "lit capacity IRUs," not only did Qwest fail to properly account for these transactions, Qwest concealed its provision of prohibited in-region, interLATA services. Pursuant to these "lit capacity IRU" agreements, Qwest merely provides "transmission," and not the actual transfer, sale, and assignment of facilities. Qwest's characterization of these transactions is in direct conflict with the language of the federal Act, which first defines prohibited in-region, "interLATA services" as "telecommunications"<sup>3</sup> and then, in turn, defines "telecommunications" as "transmission ... of the user's choosing."<sup>4</sup> Thus, because Qwest is selling "transmission" through its IRU agreements, Qwest is providing a telecommunications service, irrespective of whether Qwest refers to it as an IRU or a facility. In other words, Qwest's original argument was merely an attempt to divert attention from the plain language and meaning of the statute.

In fact, its own cleverness has finally caught up with Qwest, because Qwest has now

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<sup>2</sup> *Touch America, Inc. v Qwest Communications Corporation*, File No. EB-02-MD-0003 (Feb. 8, 2002).

<sup>3</sup> 47 U.S.C. § 153 (21).

<sup>4</sup> 47 U.S.C. § 153 (48).

reversed field, admitting that capacity may have been improperly booked as IRUs when it should have been booked as services.<sup>5</sup> In its *IRU Announcement*, Qwest discloses that it has “in some cases applied its accounting policies incorrectly with respect to certain optical capacity asset sale transactions in 1999, 2000 and 2001.”<sup>6</sup> More particularly, Qwest admits that, in some instances, the “optical capacity asset sales” should have been “instead treated as operating leases or services contracts.”<sup>7</sup> Because of ongoing FCC, SEC, and DOJ investigations, it appears that Qwest had no choice but to admit that its so-called “lit capacity IRUs” are not facilities but are in fact services. Qwest’s “IRU” scheme no longer provides it cover, and Qwest now effectively admits that it has been providing in-region, interLATA services. In short, Qwest has been providing “transmission” services all along, in violation of section 271 of the Act.

There is, therefore, little doubt that Qwest has been violating section 271 for at least two years. Furthermore, the reason it has taken so long to detect the violation is because Qwest misclassified the nature of the transactions and, as a result, deceived those responsible for regulatory oversight.

The appropriate response by this Commission is simply to stop, and allow the FCC, SEC, and DOJ investigations to be completed, before taking further action on Qwest’s section 271 Application. Too much is at stake for the Commission to continue, in a virtual vacuum, without

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<sup>5</sup> See “Qwest Communications Provides Current Status of Ongoing Analysis of its Accounting Policies and Practices,” July 28, 2002, [www.qwest.com/about/media/pressroom](http://www.qwest.com/about/media/pressroom) (“*IRU Announcement*”).

<sup>6</sup> See *IRU Announcement* at 1. Qwest made clear that the analysis of its accounting policies and practices include those with respect to revenue recognition of sales of optical capacity assets (*i.e.*, IRUs). *Id.*

<sup>7</sup> *IRU Announcement* at 2.

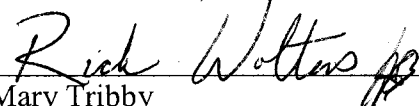
adequate information relating to the full extent of Qwest's wrongdoing.<sup>8</sup> Ignoring the issue is clearly not in the public interest.

The country is currently in a crisis over the lack of ethics among certain business leaders. Qwest is in the center of that crisis. Qwest is under investigation by the SEC and is subject to a criminal inquiry by the DOJ with respect to the manner in which Qwest accounted for sales of IRUs. In this context, it behooves this Commission to put the brakes to the section 271 approval process.

AT&T requests a stay in these proceedings, pending further investigation into Qwest's wrongdoing by the federal regulators. In the alternative, AT&T requests that the Commission initiate a full investigation into Qwest's IRUs to determine if Qwest has and continues to provide in-region, interLATA services in violation of the Act. Provided Qwest cooperates fully, and is forthright and diligent in responding to discovery from the Commission and the parties, such an investigation should be concluded without unduly affecting the procedural schedule.

Dated this ~~8<sup>th</sup>~~<sup>12<sup>th</sup></sup> day of August, 2002.

AT&T Communications of the  
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<sup>8</sup> In the alternative, the Commission might choose to initiate its own investigation into Qwest's wrong doing. If Qwest were to cooperate fully with such an investigation, and be forthright and diligent in its response to Commission inquiries, such an investigation could be completed without any modification to the existing procedural schedule in this docket.

## CERTIFICATE OF SERVICE

I hereby certify that the original and 10 copies of Motion for Stay of Proceeding or, In the Alternative, To Reopen the Record Regarding the Public Interest on behalf of AT&T Communications of the Mountain States, Inc. and TCG Phoenix, regarding Docket No. T-00000A-97-0238, were hand delivered this 12th day of August, 2002, to:

Arizona Corporation Commission  
Docket Control – Utilities Division  
1200 West Washington Street  
Phoenix, AZ 85007

and that a copy of the foregoing was hand-delivered this 12th day of August, 2002 to the following:

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